

Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** Norfolk Shipbuilding & Drydock Corporation

**File:** B-248549

**Date:** August 26, 1992

Daniel R. Weckstein, Esq., and William M. Dozier, Esq., Vandeventer, Black, Meredith & Martin, for the protester. Terence Murphy, Esq., Kaufman & Canoles, for Marine Hydraulics International, Inc., an interested party. Janice Passo, Esq., and Stephen P. Anderson, Esq., Naval Sea Systems Command, for the agency. Jeanne W. Isrin, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Although solicitation required certification of drydocking availability to be submitted with bid, certification concerns bidders' capability to perform the contract, and therefore is a matter of responsibility (not responsiveness) that need only be met prior to award; solicitation cannot convert matter of responsibility into one of responsiveness.

### DECISION

Norfolk Shipbuilding & Drydock Corporation (Norshipco) protests the award of a contract to Marine Hydraulics International, Inc. (MHI) under invitation for bids (IFB) No. N62678-92-B-0024, issued by the Naval Sea Systems Command (NAVSEA), Portsmouth, Virginia, for the drydocking phased maintenance of the U.S.S. McCandless, a fast frigate trainer.

We deny the protest.

The solicitation, issued on March 3, 1992, contained the following provision: "Offerors who do not have a suitable drydock certified by NAVSEA in accordance with MIL-STD-1625 A/B(SH) at the time of bid opening shall be determined non-responsible." It also contained a form upon which bidders were to certify that they had the use of a drydock, the name of which they were to supply, for performance of the contract. At the April 14 bid opening, five bids were received, of which MHI's was low and Norshipco's second low. In its bid, MHI certified that it had the use of "Colonna's

Shipyard, Floating Dry Dock No. 1" for performance of the contract.

In the process of evaluating MHI's responsibility, the contracting officer became aware of questions regarding MHI's right to use the drydock of Colonna's Shipyard, Inc., stemming from a dispute between Colonna's and another bidder, the Jonathan Corporation. Specifically, Jonathan claimed the right to the drydock for the same period covered by the contract here, and had committed its use to its own service of the U.S.S. Dale, another Navy vessel. Thus, although Colonna's apparently had agreed to allow MHI the use of the drydock, this dispute raised a question as to whether Colonna's itself had the right to the drydock.

On April 30, Norshipco filed this protest with our Office, staying award of the contract. See 4 C.F.R. § 21.4(a) (1992); Federal Acquisition Regulation (FAR) § 33.104(b). While the protest was pending, MHI continued trying to establish the availability of its proposed drydock. Ultimately, the underlying conflict was resolved, the agreement being that Jonathan would first use the drydock to service the Dale and, following the undocking of the Dale, MHI would have the use of the drydock to service the McCandless; all service time frames involved were acceptable to NAVSEA. Hence, as of June 19, MHI had drydock availability to perform the contract, and was otherwise found responsible by the contracting officer. On June 29, NAVSEA proceeded with the award to MHI based on a determination that performance was required due to urgent and compelling circumstances significantly affecting the interests of the United States. See 4 C.F.R. § 21.4(a); FAR § 33.104(b).

Norshipco maintains that, as the certification of drydock availability was required with the bid, it concerned bid responsiveness, and that, because MHI had no drydock availability as of bid opening, its bid should have been rejected as nonresponsive. Even if the certification is a matter of responsibility, Norshipco argues, MHI should have been found nonresponsive because it did not satisfy the requirement that it be submitted at bid opening.

Generally, responsiveness involves a determination of whether a bidder has unequivocally offered to provide supplies or services in conformity with all material terms and conditions of the solicitation. Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372; The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. Responsibility, on the other hand, refers to a bidder's apparent ability and capacity to perform all contract requirements, and is

determined, not at the time of bid opening, but at anytime prior to award, based on any information received by the agency up to that time. FAR §§ 9.104-1(f) and 9.104-3(b).

MHI completed and signed its bid, thereby obligating itself to perform as required by the IFB. The fact that MHI did not have drydock availability at the time of bid opening in no way eliminated or reduced this obligation. MHI's bid therefore was responsive.

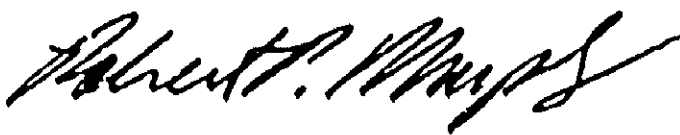
The drydock availability provision clearly related to bidder responsibility, that is, whether the bidder had the facilities necessary to satisfactorily perform the required services. See Detyens Shipyards, Inc., 71 Comp. Gen. 101 (1991), 91-2 CPD ¶ 500, rev'd on other grounds, Department of the Navy--Recon., B-244918.3, July 6, 1992, 92-2 CPD ¶ \_\_\_\_ (drydock availability is a matter of responsibility); Braswell Servs. Group, Inc., B-248336, Aug. 19, 1992, 92-2 CPD ¶ \_\_\_\_ (accessibility of drydocking facilities is a matter of responsibility). This being the case, MHI properly could establish the availability of its proposed drydock up until the time of award. In this regard, the contracting officer ordinarily should solicit and consider information on responsibility matters anytime before award; where the bidder is able to correct a factor which determines responsibility, the contracting officer should accept the new evidence of responsibility. N.G. Simonowich, B-240156, Oct. 16, 1990, 90-2 CPD ¶ 298. Here, the record establishes that MHI obtained drydock availability prior to award--Norshipco does not claim otherwise--and so was properly found to have met the requirement.

Although the solicitation stated that the certification was required at bid opening, it is well-established that the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. Mobility Sys. and Equip. Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412; N.G. Simonowich, supra.

Norshipco argues that the solicitation was fatally defective because the erroneous requirement that the certification be provided at bid opening may have prevented potential bidders from competing. However, Norshipco has suffered no prejudice as a result of the provision, and is not an interested party eligible to protest on behalf of unknown

potential bidders. See 4 C.F.R. §§ 21.0(a) and 21.1(a); Sterling Servs. Inc., B-240381, Aug. 16, 1990, 90-2 CPD ¶ 137. Norshipco claims entitlement to protest costs on the basis that the agency's correct application of the certification provision as a responsibility matter, in the face of an IFB providing otherwise, constituted corrective action. Under our Regulations, a protester may be entitled to recover its protest costs where the agency takes corrective action in response to the protest. See 4 C.F.R. § 21.6(3). Even if we agreed that there was agency corrective action, it occurred prior to Norshipco's protest and therefore clearly was not in response to it.

The protest is denied.

  
for James F. Hinchman  
General Counsel